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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

EMANUEL HARRIS,
Counsel for Petitioner.

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No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

against

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petition of A. J. Paretta Contracting Co., Inc., respectfully shows to this Court:

This is a petition for a Writ of Certiorari to the Court of Claims of the United States.

On October 6, 1947, the Court of Claims denied recovery upon two items of petitioner's claims for additional compensation under contracts with the United States for the Construction of housing. This petition is to review such denial. Judgment was granted to petitioner in the sum of $2,659.47 upon one item of petitioner's claim not involved in this petition (R. 55).

Jurisdiction

The jurisdiction of this Court is invoked to review a judgment of the Court of Claims.[1]

[1] 53 Stat. 752; U. S. C. 28:288.

Statement of the Matters Involved

Petitioner entered into two contracts with the National Housing Agency, Federal Public Authority, for construction at Massena, New York, of housing (R. 26). The first contract (30082) was executed on June 9, 1942. The second contract (30083) was executed on December 2, 1942 (R. 27).

I

The first item of petitioner's claim denied by the Court of Claims relates to increased wage rates paid by petitioner above the minimum rates specified in contract 30083, as determined by the Secretary of Labor under the Bacon-Davis Act [2] (R. 35), and stabilized by the Stabilization Act [3] and Executive Order 9250.[4]

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[2] 49 Stat. 1011; 54 Stat. 399; U. S. C. 40:276a.

"Rate of Wages for Laborers and Mechanics. The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there."

[3] 56 Stat. 765; U. S. C. App. 50:43.

"Sec. 1. In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before Novembere 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. . . ."

[4] October 3, 1942.

"1. No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or other-

The determination of the Secretary of War as to the wage rate for carpenters of $1.25 per hour was made on August 10, 1942 (R. 35). The Court of Claims found that petitioner used the basic wage rates set forth in the specifications in computing its bid (R. 30). Subsequent to the execution of the contract, carpenters on the project refused to work at the rate of $1.25 per hour specified in the contract (R. 30-31). The Secretary of Labor thereupon modified the determination of the prevailing rate for carpenters made on August 10, 1942, and substituted $1.35 for $1.25 (R. 35). As a result of such modification, petitioner paid $3,662.30 more for the wages of carpenters than it would have paid under the rate specified in the contract. Petitioner made claim for this amount in the Court of Claims (R. 36).

The Court of Claims held that under the contract provisions, changes in the determination of the prevailing wages as made by the Secretary of Labor prior to the execution of the contract, were contemplated; that the Government did not warrant that $1.25 was the prevailing wage or would remain the prevailing wage; and that under the contract petitioner agreed to pay the wages based on determinations made after the execution of the contract (R. 50, 51).

The Court of Claims also held that the modification of the prior determination was made by the Secretary of Labor in response to petitioner's request for assistance in solving the dilemma created by the refusal of the carpenters to work for what the Secretary had determined was the prevailing wage and the prohibition of the Executive Order against the payment of higher wages, and that the modification of the

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wise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases."

prior determination was for petitioner's benefit, so that petitioner is estopped from asserting its claim (R. 51, 52).

The ruling of the Court of Claims was erroneous in its application of the provisions of the Bacon-Davis Act, under which the Secretary of Labor is under a duty to determine the prevailing wage prior to the execution of a contract, so that the wage rate as so determined may be set forth in the advertised specifications for the guidance of prospective bidders. Moreover, such ruling was erroneous in holding that the Secretary of Labor was authorized to change the wage rate subsequent to the execution of the contract, without compensation to the petitioner.

II

In anticipation of the construction under the second contract (30083) and in order to expedite it, the Government, on October 21, 1942, issued to petitioner Change Order #20 on the first contract (30082) providing for the construction of foundations, footings and piers for the housing included in Project 30083 (R. 26-27). The Change Order directed petitioner to furnish the material and labor for the excavation and back fill for all piers and all masonry work for the piers exclusive of any grading[5] (R. 40). It was anticipated that the foundations for Project 30083 could be completed before the cold weather set in and that work on the superstructures could go forward during cold weather (R. 41). By the end of December, 1942, petitioner completed the piers for 31 buildings and footings for one other

[5] The Change Order provision was as follows: (R. 40).

". . . furnish all material, labor and equipment necessary to entirely complete the excavation and backfill for all piers; concrete footings, including forms; all masonry work for foundation piers, including foundations for chimneys; anchors required in piers for floor girders; and engineering required to lay out foundations, all as shown on the drawings • • • for Project NY-30083 • • • exclusive of the stripping of top soil, general cut and fills, *or any grading.*"

building (R. 41). The work performed in the installation of the piers was in conformity with the specifications (R. 41). Little progress on the superstructures was made during the winter. The project engineer ordered work stopped because of the cold (R. 41).

The piers were inserted 3½ feet in the ground at the natural grade, which was later found to be lower than indicated on the plans (R. 42). In the absence of superstructures being placed on the piers, the only feasible method of protecting them against frost action would have been by placing earth around the piers (R. 42). If the grade had been indicated on the drawings, the piers would have had more protection (R. 42). The specifications provided that if the existing grades were lower than shown on plans, no fill need be provided (R. 42).[6]

Petitioner received notice to proceed on contract 30083 on December 7, 1942 (R. 41). During the winter, frost action in the ground tilted or toppled over 1,188 piers (R. 42). The Government requested petitioner to furnish a proposal for the adjustment of these piers (R. 43). Petitioner submitted its proposal in the sum of $11,500.93 for the realignment and adjustment of the piers (R. 43). The Government replied that the work was required under the contract and as such should be performed at no additional cost to the Government (R. 44). Petitioner demanded an equitable adjustment by reason of the necessity of restoring the piers to proper line and grade (R. 46) which was refused (R. 46). Petitioner completed the work of correcting the piers, the fair and reasonable price therefor being $11,500.93 as contained in petitioner's proposal (R. 46). Item III of petitioner's claim in the Court of Claims was for the recovery of said sum.

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[6] The specification was as follows:

"(f) Grade areas under buildings to levels shown on plans. If existing grades are lower, no fill need be provided."

The Court of Claims held that under the general provision of the contract [7] (30083) petitioner was responsible for the proper care and protection of the work against cold, and that petitioner under said contract provision should have taken the necessary precaution against the frost action to prevent the piers from getting out of alignment (R. 54-55).

The Court of Claims, in so ruling, gave no effect to the express exclusion of grading work in Change Order #20, nor to the specification in the contract that no fill need be provided if the existing grades were lower than shown on the plans, nor to its finding that the existing grades were lower than indicated on the plans, nor to its finding that the only feasible method of protecting the piers against frost action would have been by grading (placing earth around the piers), nor to its finding that if the grade had been as indicated on the drawings, the piers would have had more protection.

The ultimate finding of the Court of Claims that petioner was required to perform the corrective work under the general provision in the contract as to protection of the work against cold, was therefore not sustained by the primary or evidentiary findings as to the facts. Such ulti-

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[7] The Contract provision was as follows:

"Care of Work.

"a. The Contractor shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

"b. The Contractor shall provide temporary heating, covering, and enclosures as necessary and to the satisfaction of the Contracting Officer to protect all work and material against damage by dampness and cold, to dry out the buildings properly, and to facilitate completion of the work; * * *" (R. 54-55).

mate finding may be reviewed by this Court on a writ of certiorari to the Court of Claims.[8]

Questions Presented

1. Under the Bacon-Davis Act which requires the Secretary of Labor to determine prevailing rates of wages, and requires that such rates shall be inserted in the advertised specifications, where a contractor uses such rates in estimating his bid, may the Secretary of Labor, subsequent to the execution of the contract, increase the rate previously established, and thereby require the contractor to pay the same without compensation for such increase?

2. Under the Bacon-Davis Act, where the Secretary of Labor erroneously establishes a rate of wages as the prevailing wage, lower than the actual prevailing wage, and such erroneous rate is advertised in the specifications for a Government contract, and the contractor uses such rate in estimating his bid, may the Secretary of Labor, subsequent to the execution of the contract, correct the error by increasing the rate as advertised to the actual prevailing rate and thereby require the contractor to pay the increased rate without compensation for such increase?

3. May recovery to a contractor for such compensation be denied upon the ground that the contractor requested assistance of the Secretary of Labor in a situation where its carpenters refused to work at the rate determined by the Secretary of Labor and as set forth in the contract, in response to which request, the Secretary increased the rate required to be paid?

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[8] 53 Stat. 752; U. S. C. 28:288.

"In such cases, the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned . . . that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts."

4. Where the Court of Claims finds that specific provisions in a Government contract and change order exclude work which, without such specific provisions, would be required under a general contract provision as to the care and protection of work, and where the Court of Claims also finds that such work is made necessary by reason of erroneous grades in the plans, may the contractor recover for such work?

5. Where specific provisions in a Government contract and change order exclude grading around piers, may the contractor be required to protect the piers from frost action under a general provision of the contract requiring protection of the work from cold, where the only feasible method of protection was grading around the piers?

Reasons for Allowance of Writ

1. The case involves a question of public importance, as to whether a contractor in bidding on a Government contract may rely on the rates of wages determined by the Secretary of Labor and stated in advertised specifications as required by the Bacon-Davis Act, and whether the contractor may be subjected to increased costs due to increased wage rates resulting from subsequent determinations of the Secretary of Labor.

2. The case involves an important question of Federal law which has not been decided by this Court and should be settled as to whether under the Bacon-Davis Act, the Secretary of Labor is authorized, subsequent to the execution of a Government contract, to modify his determination as to the wage rates stated in advertised specifications.

3. The case involves an important question of general and Federal law as to whether, in bidding on Government contracts, and in the performance thereof, a contractor may rely on the explicit declaration in the specifications of work

to be omitted, and whether the contractor may be directed to perform such work under a general provision in the same contract, which, if it were not for the specific declaration, would include such work.

4. The Court of Claims has decided the above question in conflict with the weight of authority and in conflict with the applicable decisions of this Court.

Petitioner therefore prays that a writ of certiorari may be granted to review the judgment of the Court of Claims of the United States and that such writ may be issued to said Court directing that all proceedings may be forwarded to this Court for review.

Dated: New York, December 16, 1947.

Respectfully submitted,

A. J. Paretta Contracting Co., Inc.,
By Emanuel Harris,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

against

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Petitioner Is Entitled to Recover for the Increased Wages Paid to Carpenters Resulting from the Modification of the Wage Rate Subsequent to the Execution of the Contract.

Pursuant to the Bacon-Davis Act, it was the duty of the Secretary of Labor to determine the prevailing wage rate for carpenters prior to the execution of the contract, so that such wage rate could be set forth in the advertised specifications and included in the contract. Such determination was made on August 10, 1942 and the rate was fixed at $1.25 per hour (R. 35) and so set forth in the contract

(R. 29). Such rate was not only the minimum rate which required to be paid but, by reason of the Stabilization Act and Executive Order 9250, it was the only rate that could be paid.

The Court of Claims found that petitioner used such wage rate in computing its bid (R. 30).

The contract provision with respect to the payment of carpenters' wages at the rate determined prior to the signing of the contract was part of the petitioner's agreement with the Government, which was beyond the power of the Secretary of Labor to change or modify without compensation to the petitioner.

There is no decision by this Court as to the power of the Secretary of Labor under the Bacon-Davis Act to modify his prior determinations as to wage rates, subsequent to the execution of a contract.

In *U. S. for the use of Wylie* v. *Barton,* 79 F. (2d) 496, C. C. A. 4, it was held that the Secretary of Labor was without power even to postpone or defer the time when his finding as to the prevailing wage rate should become effective, and it was there said (P. 498):

> "The contractor, in accordance with the act, agrees to pay the prevailing rate of wages, that is to say, the rate prevailing while the public work is being done; *and no discretion is conferred upon the Secretary to modify or change the effect of the agreement.*" (Italics ours.)

The Court of Claims in our case stated that the contract provided that the contractor shall pay not less than the wages which the Secretary of Labor may "from time to time" determine as the prevailing wage (R. 50). The contract contains no such provision. The contract (Article 6, Par. a) provides that the contractor will pay not less than the wages specified, *i. e.* $1.25 per hour for carpenters (R. 29). The Court of Claims properly stated that such wage

as specified was based upon the last determination of the Secretary of Labor prior to the execution of the contract (R. 50-51). But the Court of Claims also stated that the only purpose of paragraph c of Article 6 of the contract was to require the contractor to pay any minimum wage that might be determined by the Secretary of Labor after the execution of the contract (R. 50-51).

Paragraph c reads:

> "The determinations of the Secretary of Labor shall be deemed to establish the minimum wages which may be paid to the designated laborers and mechanics . . ." (R. 50).

The meaning of "determinations" in the above provision must be arrived at by reference to the provisions of the Bacon-Davis Act, quoted in the accompanying petition, from which the authority of the Secretary of Labor to determine prevailing and minimum wages is derived. Those provisions refer to the setting forth in the advertised specifications for every contract to which the United States is a party the minimum wages to be paid based on the wages that will be determined by the Secretary of State to be prevailing. *There is no authority granted in the statute to the Secretary of Labor to fix different minimum wages subsequent to the advertised specifications, and there is no provision in the contract by which the contractor agrees to pay wages according to any later determination,* as stated by the Court of Claims (R. 51): The use of the plural "determinations" instead of the singular "determination" must be deemed to refer to the several classes of mechanics and laborers involved, rather than to the date of the determination.

The Court of Claims stated that the Government did not warrant that $1.25 was the prevailing wage (R. 51). Again the Court of Claims gave no effect to the provisions of the

Bacon-Davis Act which state that the minimum wages provided for in the specifications shall be based upon the wages determined by the Secretary of Labor "to be prevailing."

Moreover, the contract itself provides that the determinations of the Secretary of Labor shall be "deemed" to establish the minimum wages (Par. c, above quoted).

The Court of Claims found that there was no misrepresentation of the wage rate because the sole basis for the modification by the Secretary of Labor was that petitioner itself had been paying the higher rate on the prior contract (R. 51). Such finding was inconsistent with the Court's finding that petitioner used the rate stated in the specifications in preparing its bid (R. 30). The modification of the wage rate based solely on the fact that petitioner was paying a higher rate on a prior contract was unauthorized and clearly contrary to the statute.

The Secretary of Labor was required by the Bacon-Davis Act to determine the "prevailing" wage for the several classes of mechanics "in the city, town, village or other civil subdivision of the State in which the work is to be performed". (See quotation in petition (footnote 2) from Bacon-Davis Act.) The Court of Claims found that whereas petitioner employed 150 carpenters on the prior contract, 200 to 300 more carpenters were employed nearby in the construction plant of the Aluminum Company of America and that there was no evidence as to the wage rate paid at such other plant (R. 30). It was the duty of the Secretary of Labor to obtain the evidence as to the wage rate paid at the nearby plant, which employed the majority of carpenters in the territory (R. 30). Petitioner should not be denied its increased costs resulting from the failure of the Secretary of Labor to obtain the evidence necessary to determine the correct prevailing wage.

Moreover, the Court of Claims found that at the time the bid was prepared, petitioner had some hope that carpenters would be released from the Aluminum Company plant and from the prior contract in such numbers and such times that carpenters could be obtained at the $1.25 rate (R. 30).

In view of such findings, the acceptance by the Court of Claims of the Secretary of Labor's modification of the wage rate based solely on the fact that petitioner was paying the increased rate on a prior contract to less than the majority of carpenters employed in the territory, was clearly improper, even if the Secretary of Labor had the authority to change his prior determination.

Finally, the Court of Claims held that the Government did not warrant that the $1.25 would remain the prevailing wage, and refers to paragraph d of Article 6 in support of such ruling (R. 51).

Paragraph d reads as follows (R. 29):

> "d. The specified wage rates are minimum rates only, and the Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

The intent of the above provision clearly was that the contractor should have no claim for additional compensation because of the voluntary payment of any increased wages because of union demands or similar circumstances, but not because of an act of the Government.

This construction was given to such provision by the Court of Claims itself in granting judgment to petitioner herein for increased wages of laborers paid by petitioner

as a result of the direction of the Government. The Court of Claims in awarding petitioner the increased amount paid to laborers said (R. 53):

> "It is no answer to say that the contractor would probably have had to pay the increased wages anyway, that it had not been able to get the laborers to work for less, independent of the Government's demand, and that it probably would not have been able to do so in the future. This is speculation. The probabilities are that it would not have been able to get the laborers to work for less, but whether or not this is so, we do not know. *What we do know is that the activating cause of its paying the increased wages was the Government's demand upon it.*" (Italics ours.)

The Board of Contract Appeals, established by the Secretary of War [9] to hear appeals from rulings of contracting officers to the head of the Department, has consistently held under the above contract provisions that the contractor has a right to rely on the correctness of the predetermined wage rates and may recover for increased wages paid pursuant to subsequent changes made by the Secretary of Labor.

In *Northwestern Engineering Co.*, B. C. A. No. 732, 3 C. C. F. 10, 13, it is stated:

> "The Act of August 30, 1935, 49 Stat. 1011, as amended, makes specific directions. It requires that 'The advertised specifications' shall contain a provision

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[9] August 8, 1942.

"1. There is hereby constituted in the Office of the Under Secretary of War a board to be known as 'War Department Board of Contract Appeals' . . .

"3. The board created by paragraph 1 of this memorandum is hereby designated as the duly authorized representative of the Secretary of War to hear, consider and decide as fully and finally as the Secretary of War might do, appeals to the Secretary of War under contracts which contain provisions authorizing the Secretary of War to designate a board as his duly authorized representative to determine appeals."

stating minimum wages, based upon the wages that are determined by the Secretary of Labor to be prevailing. That direction is applicable to none other than the contracting agencies of the Government. Contractors have and take no part in the making up of 'the advertised specifications.' Therefore, when contracting agencies of the Government make up 'the advertised specifications', it is their duty to set forth the correct wage rates as predetermined by the Secretary of Labor. And contractors have a right to rely upon the correctness of the predetermined wage rates as set forth in the specifications.

"The statute further requires that every contract based upon these specifications shall contain a stipulation requiring the contractor or subcontractor to pay its or his laborers the full amounts of their wages computed at wage rates not less than those stated in the advertised specifications. By this the statute requires, as this Board interprets it, that contractors shall pay their laborers wage rates not less than those predetermined to be prevailing by the Secretary of Labor.

"There is no dispute that 'the advertised specifications' for the instant contract state an incorrect wage rate for unskilled laborers. The wage rate set forth in the advertised specifications had been changed by the Secretary of Labor from $.625 per hour to $.80 per hour. The change had been made previous to the time the advertised specifications were placed in the hands of this appellant. Consequently, an error had been committed, and it was committed by a governmental agency whose duty it was to state the wage rate correctly."

The Government, in advising petitioner of the adjustment made by the Secretary of Labor, stated petitioner was "permitted" to pay the increased rate (R. 35). Since under the Bacon-Davis Act petitioner was required to pay the rate prevailing at the time its contract was bid, the word "permitted" was a euphemism.

In *Northwestern Engineering Co.* (*supra*) at pages 14, 15, it is stated:

> "It is difficult to understand the direction made in paragraph numbered 2 to the effect that contractors (including appellant) may be permitted to pay the increased rate at their own expense without being considered in violation of Executive Order 9250. This may have been intended to be a gesture of generosity, probably in the realization that labor unions at the site would see to it that appellant did pay the increased rate. But this Board cannot locate the authority for the gesture made, and is unable to fathom to what extent influence could be brought to bear to prevent prosecution of appellant, in case appellant refused to pay the increased rate . . .
>
> "But we cannot subscribe to the theory that there is any sanctity to a contract, whereby the Government may insist upon its vested rights, when the Government itself, through its agents, has violated that sanctity by failing to carry out its statutory obligation to embrace in its advertised specifications, the true and accurate rates, thereby misleading contractors to compute bids inaccurately, and to their disadvantage. Such a situation is unconscionable, and should be corrected within the department where the errors occurred, without compelling complainants to pursue their remedies in the courts (See Edmund J. Rappoli Company, Inc. *v.* The United States, 98 C. Cls. 499, 1 C. C. F. 461)."

In *Blauner Construction Co.* B. C. A., No. 1315, 4 C. C. F. 50, 229, the Secretary of Labor included the correct prevailing rate in the advertised specifications, but between the time of such advertising and the date of execution of the contract, the Secretary of Labor found an increased prevailing rate. Recovery of the difference was allowed, it being stated:

> "The Bacon-Davis Act provides that the advertised specifications shall state the minimum wage rates prescribed by the Secretary of Labor at the time bids are

solicited, and that a contract based upon such specifications shall require the contractor to pay the minimum wage rates stated in the specifications. However, the purpose of the act is to require the contractor to pay the minimum wage rates prescribed by the Secretary of Labor at the time the contract is signed, and it was the obligation of the contracting officer to afford the appellant an opportunity to correct its bid before the contract was executed. Since it was the Government that changed the rates, the contracting officer must be charged with the knowledge of the action. The Board believes that if either party had known that the Secretary of Labor had increased the rates, the appellant would have been allowed to revise its bid and that the formal contract would have been based upon the increased rates. Under such circumstances, the appellant is entitled to a supplemental agreement making an appropriate price adjustment. The appeal is sustained."

In *Sanders*, B. C. A. No. 1015 3CCF 1055 an erroneous rate was set forth in the contract. Recovery was allowed for the increased cost resulting from the requirement to pay the true prevailing rate.

The Court of Claims stated that the petitioner says that the Secretary of Labor made a mistake in his determination of the prevailing wage and that having contracted upon the basis of his determination, petitioner is entitled to recover the excess amount it was required to pay (R. 50). The Court of Claims held that petitioner's position could not be maintained (R. 50). The Court made no finding that the first determination of the Secretary of Labor was an error.

In the absence of error in the first determination, there was no authority in the Secretary of Labor to change the wage rate subsequent to the execution of the contracts. *U. S. for the use of Wylie* v. *Barton, supra.*

If there was error by the Secretary of Labor in the first

determination, petitioner is entitled to recover the increased wages paid by it in reliance on such erroneous determination (cases above cited).

It is a matter of public importance that bidders on Government contracts may know whether they can rely on the wage rates advertised in the specifications as determined by the Secretary of Labor under the Bacon-Davis Act, or whether they will be subjected to increased costs due to later determinations not authorized by the Act.

II

Petitioner Should Not Be Denied Recovery Because It Requested Assistance in the Situation Arising from the Refusal of Carpenters to Work at the Rate Determined by the Secretary of Labor, and the Resulting Modification of the Wage Rate.

The Court of Claims denied petitioner's claim for the increased wages paid to carpenters upon its construction of the contract provisions (R. 50). However, the Court also stated that because of petitioner's request for assistance in solving the dilemma created by the refusal of the carpenters to work, petitioner may not make a claim against the Government based on an act done for its benefit (R. 51). The Court of Claims found, however, that plaintiff did not "affirmatively" agree to withhold claim against the Government for additional compensation in event the carpenters' wage rate was increased (R. 34), although it stated that the Government representatives "understood" that petitioner would make no claim against the Government and with this understanding induced the Secretary of Labor to modify his determination of the wage rate (R. 49).

The Bacon-Davis Act places an absolute duty on the Secretary of Labor to determine and require the payment of the prevailing wage rate and directs that such rate be included in advertised specifications.

The effect of the ruling of the Court of Claims is to give force to the refusal of the Secretary of Labor to properly perform the duty imposed by the statute unless, as a condition, petitioner waive such rights as it might have.

Not only is such ruling without legal foundation, but, as above shown, the Court of Claims found that petitioner did not "affirmatively" waive its rights (R. 34). The denial of recovery upon the ground of waive or estoppel was therefore contrary to the facts as well as the law.

Moreover, the ultimate finding that petitioner waived its claim for additional compensation because of the payment of increased wages, is not sustained by the evidentiary finding that petitioner did not agree to withhold such claim (R. 34). Such ultimate finding may be reviewed by this Court.[10]

III

The Denial by the Court of Claims of Recovery for Work Performed by Petitioner in Adjusting the Piers Was Contrary to the Established Rule That in the Construction of Contracts, Including Contracts to Which the United States Is a Party, Specific Provisions Excluding Certain Work Control Over General Provisions in the Same Contract Pursuant to Which Such Work May Be Required.

The Change Order issued to petitioner on contract 30082 for the installation of piers in anticipation of the construction of housing under the subsequent contract (30083) specifically excluded grading work (R. 40). The specifications in contract 30083 also provided that if the existing grades were lower than shown on the plans, no fill need be provided (R. 42).

The Court of Claims made a finding of fact that the only feasible method of protecting the piers against frost action was by placing earth around the piers, *i. e.*, grading

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[10] 9 U. S. C. 28:288; see petition, footnote 8.

(R. 42). The Court also found that if the grade had been as indicated on the plans, the piers would have had more protection, *i. e.*, more earth around them (R. 42).

Nevertheless, the Court of Claims held that petitioner was required to protect the piers against cold, *i. e.*, grade around the piers by providing fill and placing it around the piers, under the general provision of the contract requiring petitioner to protect the work against cold (R. 54-55).

Such ruling was contrary to the principle of law repeatedly applied by this Court that the explicit declaration in a Government contract of the work to be omitted, controls over a general provision in the same contract under which such work might otherwise be required.

U. S. v. *Smith*, 256 U. S. 11, 16;
Holleback v. *U. S.*, 233 U. S. 165;
U. S. v. *Standard Rice Co.*, 323 U. S. 106;
U. S. v. *Atlantic Dredging Co.*, 253 U. S. 1, 11.

The ruling of the Court of Claims was contrary to the established rule of law, and the applicable decisions of this Court.

It is a matter of public importance in the performance of Government contracts, that contractors may rely upon such established rule of law, so that in bidding on Government contracts, they may know that the work required of them will be as clearly stated in such contracts, that they will not be subject to increased costs for work which they have not agreed to perform.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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